DOCUMENT RESUME

ED 145 030 UD 017 367

TITLE Aspira of New York, Inc., et al., Plaintiffs, against Board of Education of the City of New York, et al., Defendants.
INSTITUTION District Court, New York, N.Y. Southern District of New York.
PUB DATE 1 Apr 76
NOTE 19p.; Best copy available. Parts of this document may be marginally reproducible due to the print quality of the original document

EDRS PRICE MF-$0.83 HC-$1.67 Plus Postage.
DESCRIPTORS *Boards of Education; *Community Involvement; *Court Litigation; *Failure Factors
IDENTIFIERS *Aspira Incorporated v New York City Board of Educ; *New York (New York)

ABSTRACT

This is a record of testimony of the Petitioners for the Community School Board District 30 against the Board of Education of the City of New York. The Community School Board is seeking intervention concerning compliance with the court's decree on the civil rights case of Aspira of New York, Inc. vs. the Board of Education of the City of New York. The petition to intervene is dismissed. It is noted that the petition for intervention was hastily and inadequately considered and its implications wholly ignored. The court concluded that it is not for every local official or subordinate agency to decide for itself what is adequate compliance with the court's decree. Both for its procedural deficiencies and for substantive reasons as stated, the petition of this local board and its members was dismissed. (Author/AM)

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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ASPIRA OF NEW YORK, INC., et al.,

Plaintiffs,

- against -

72 Civ 4002

BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.

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New York, N. Y.
April 1, 1976

B e f o r e:

HON. MARVIN E. FRANKEL,

District Judge

Appearances:

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U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
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THE COURT: Are you ready, gentlemen?

MR. GALLAGHER: Yes, your Honor.

THE COURT: Mr. Gallagher, before you begin on the merits, you are assailed at the threshold specially by the plaintiffs here for what they assert is formal and perhaps not exclusively technical insufficiency in your papers, that is, a motion to intervene. Unless I allow you to intervene, I don't suppose there is any reason for my hearing you at all.

So, first off, let me ask you, having in mind that your papers are not superbly artistic, exactly what you have in mind. Do you mean to intervene for this board and its nine members?

MR. GALLAGHER: Actually, what we are doing, your Honor, is following your Honor's own --

THE COURT: No, no --

MR. GALLAGHER: -- admonition --

THE COURT: -- don't answer my question like that. Because I don't give you legal advice. Now listen to my question and answer it. Do you mean -- and it is an English question --

MR. GALLAGHER: Yes, all right.

THE COURT: -- to be seeking intervention on behalf of this board and its nine members? Yes or no.

MR. GALLAGHER: We are in the nature of seeking intervention, such as Cepeda was in the nature of seeking intervention, which this Court permitted.

THE COURT: Are you seeking intervention for the board and its members?

MR. GALLAGHER: Yes, your Honor.

THE COURT: I assume if you are seeking intervention, since you are obviously not seeking it on the plaintiffs' side, you are seeking it as defendants.

MR. GALLAGHER: We would have to be seeking it as defendants, your Honor, in the nature of intervention. This is why I wanted to explain to you that we do not challenge the program provided by the consent decree. We are merely challenging what we originally considered to be a possible state issue only, supersession, the question of violation of the Chancellor's order.

Now we were brought into this court by virtue of the defendants in the Aspira action. They brought us in on the ground that the impingement of our action under state law to challenge supersession in this particular situation of the federal court's consent decree and the implication of the Aspira-type program in the district mandated that this was no longer a state issue.

THE COURT: But the case that they brought here I

have dismissed. You know that.

MR. GALLAGHER: You dismissed the case that we brought on the question of supersession in the state court.

THE COURT: Yes, that is dismissed. Now, we are lawyers, so we have to go by the numbers, the way lawyers do. Don't.tell me about that case. That has been dismissed. That is not the reason you are here today. You are here today with a piece of paper, which you call a petition -- which, by the way, mentions that maybe you have to intervene, and, by the way, you are right, because if you are not allowed to intervene, I am not going to hear you any more. So we are facing the first question: Should I let you intervene, who is intervening, and on what side?

Let us get some crisp answers to those questions as to your position. Are you seeking intervention? Yes or no.

MR. GALLAGHER: No. 1, we have to seek intervention.

THE COURT: So the answer is yes.

MR. GALLAGHER: Yes.

THE COURT: And you are seeking it for this board and its nine members, is that right?

MR. GALLAGHER: Yes. And on behalf of the district that it represents.

THE COURT: The district and the nine members.

MR.GALLAGHER: Yes.

THE COURT: As individuals.

MR. GALLAGHER: As a board and made up of individuals, yes, your Honor. They represent their district, having been elected.

THE COURT: Your petition speaks of the board, consisting of nine members.

MR. GALLAGHER: Yes, that is right.

THE COURT: And in a minute, because there are no hidden balls here, we will get to the very serious importance of this for your board and those nine people.

So if you are seeking intervention; you are seeking it as defendants, because that is the only side you could be on; is that right?

MR. GALLAGHER: It is just a difficult situation for me to say positively yes without a qualification. But we do not feel that the defendants are representing us as such. The Board of Education we are fighting --

THE COURT: You are not seeking intervention as plaintiffs, are you?

MR. GALLAGHER: No. But we are fighting the Board of Education. We have to be, then, if you want to -- say there is a question of alignment, one against the other --

then we have to be, I suppose, aligned with the Board of Education, because we are a board, and Aspira says that the program must be implemented in our district. By that line of reasoning, yes, we would have to be as defendants in the sense we are on the side of the defendants.

THE COURT: You could not be anything else?

MR. GALLAGHER: No, I couldn't.

THE COURT: The reason I am asking you is this: You may either want to sit down and make this decision, or make it standing up. If I allow this board and its members to intervene, whatever question there may have been before today on this subject, from today forward your clients are going to be subject explicitly and clearly to the contempt powers of this Court. I wish to ask you whether that is part of the responsibility they desire to be assuming today. If they do not, I will dismiss your petition at the threshold and we can all go home. If they do, they must understand that on their own motion and by their own desire they are bringing themselves within that contempt power -- and I don't say this lightly.

In that light, is it clear to you that such intervention is being sought?

MR. GALLAGHER: I would say yes, your Honor, because this board does not and has so instructed me -- and I

can candidly say this to the Court -- they do not take issue with the bilingual instruction program. They are for it.

THE COURT: Don't argue your case here.

MR. GALLAGHER: No, I mean they agree with it.

THE COURT: Are you clear that, just in case you have been wrong all along and just in case instead of complying you have been obstructing this Court's decree, whatever has happened before today, April Fool's Day, from here on, our friends Teitelbaum and Hiller and so on, who are not shy about making motions in this court, will have the very precise and explicit basis on which to cite you for contempt -- something that may have been a little ambiguous up until today. Therefore, you and your clients have before you a decision of some considerable gravity, and I don't want you or them making it lightly. Don't tell me whether you are in compliance. I don't know whether you are or not. Just have in mind that, from now on, when somebody says you are in 100 percent noncompliance, in case this Court were to find out that they were right, your people might be in serious trouble. And they are asking to assume the burden of that prospect, as I understand it, by this motion to intervene.

MR. GALLAGHER: Well, I haven't explained to them on that score, your Honor, the precise implications as far as

their being, shall we say, on an equal plane with the Chancellor and the Board of Education. But by the act of supersession it would seem to me that whether they cared or not concerning that aspect of the case, the Chancellor has told them that they will be--in other words, by taking away from them the power to do in their district what we consider to be their prerogative.

If you will give me a few minutes, I will talk to Mr. McGovern, who happens to be here and who is the president of the board. Perhaps I think it would be better for me not to make that unilateral decision, even though I have indicated to your Honor what the basis is.

THE COURT: I think you should. Go ahead and do it.

MR. GALLAGHER: Thank you.

(Pause)

THE COURT: Yes?

MR. GALLAGHER: If it please your Honor, the president of that board indicates to me that the board is prepared to cope with the consent decree as this Court interprets it. They ask two questions. As of this moment, if intervention is permitted, are we then permitted to place our cause before the Court ab initio to determine whether or not, as we claim, certain things should be done which have not been done and which would in fact comport with the Court's

intention in this whole matter?

Two, would the board then also be revested with its powers and supersession voided, so that then it and the Chancellor would be working together to implement whatever this Court now decides should be the proper format in which this program should be designed in the district?

These are the only two open questions.

THE COURT: I don't like members of our bar to function as messengers between their clients and the Court to conduct negotiations. I am not going to answer those questions. This is a 1972 civil case. It has been here for four years. You start talking to me of "ab initio" because some client asks you to do that. You must know that you are making an error. Nothing is going to happen in this case ab initio. A lot of people, including me, have done a lot of work on this case over four years, including a lot of work formulating a consent decree, of which due notice was given to the public, including your clients, and I don't remember that they made any contribution to any of those efforts. If they did, my recollection is faulty and I apologize, but you may be certain that all submissions that were made to this Court during those labors were duly considered. And there wasn't a word in that decree, including the ungrammatical parts, that I did not go over and make my own. The attorneys obviously handled the laboring oars.

So nothing is going to happen in this case ab initio because some local board intervenes.

As to how I will rule on supersession, that is one of the subjects on the merits in your petition for intervention, and I am more or less prepared to rule, having seen the papers, but if you are allowed to intervene I will hear you on that.

We are not going to waste any more time. I will either dismiss your petition out of hand or you are going to tell me that your clients do indeed wish to intervene, and not on the basis of any further dickering with this Court, which I won't have. If you want some more time to make a decision, take it. Then we will proceed on the basis of whatever you decide.

MR. GALLAGHER: I would be prepared to tell your Honor yes, under the circumstances. I am wondering now, though, in my own mind and quite candidly, as an advocate and not as the conscience of nine members of the board, whether or not this ought to perhaps be brought to the board itself and say, "Now, look, do you want this or don't you want it? And if you do, tell me, and I will tell the Court without any question this is what we want and we are prepared to take all the consequences and do whatever is required by the Court."

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THE COURT: I am going to rule on your petition.

This petition is, as the plaintiffs assert, formally defective. It is not a proper petition for intervention under the Federal Rules of Civil Procedure.

Nevertheless, the Court views those rules as being designed to reach the merits of controversies whenever possible, as being intended to facilitate the just resolution of controversies on their merits rather than on the basis of procedural technicalities.

For that reason I have just finished exploring with counsel for the proposed intervenors the merits and implications of this purported application for intervention. It becomes apparent that the effort to intervene in a case of such long standing in this court, a case that has engaged the very extensive attentions of the Court and public officials, to say nothing of the plaintiffs and their attorneys, it becomes apparent that this petition for intervention has been hastily and inadequately considered and its implications wholly ignored. This is not a responsible way to move into a litigation of this magnitude.

Accordingly, as a matter of fundamental procedural law and not simply as a matter of the technicalities of the drafting of the papers, the Court could not grant this petition for intervention, and it would probably

have to be dismissed on grounds I have just stated, in any event. But I think it will not hurt, and I hope it may help to keep the parties on course in this difficult and delicate matter of running a complex educational establishment, if the Court also notes some observations relating to the alleged merits of the papers on which these movants inadequately sought to intervene.

As to that, I think it should be made clear to this community board and its nine members and its people that the Court, having studied the papers with some considerable care, is in substantially entire disagreement with the observations of these proposed intervenors concerning the meaning and implications and effects of the decree to which this petition was intended to relate.

First of all, there should not have been any ambiguity about this, or at least I would have hoped there would be no ambiguity. But let it be understood that the form letters of notice that were appended to this Court's decision of July 11, 1975, were scrutinized at that time with care. They were not ignored. They were approved as being in substantial compliance with the meaning and intent of the Court's decree. They were certainly approved as against any suggestion of the kind these intervenors would make that they were somehow excessive or unsuitably coercive as against the

parents of the Hispanic children with whom the case is concerned.

The proposed intervenors are equally mistaken in their attack on the form letter of notice attached to the supplement to Special Circular No. 11, dated January 30, 1976. I don't reach any question that the plaintiffs could conceivably raise on this score. I note that so far as I am aware they have not raised any question. But I am not today directly and in detail conversant with the pending contempt matter that they have brought. So I leave aside whether they have any quarrel or criticism touching that form of notice. What I do say is that, as against these intervenors' objections, it is perfectly clear to me that the notice conforms again with the terms and the intent and the spirit of the consent decree and of this Court's order of July 11, 1975.

Further, the Court cannot function as though it comes to this case fresh or as a stranger. Being conversant with the case and having a sense of what it has been intended to be about, the Court has examined the petitioners' form letter of notice to parents, attached to their papers here as Exhibit C, and the Court declares that that form letter of notice would not be in compliance either with this Court's decree, the consent decree, or the order of July 11, 1975.

It is a form letter designed to discourage and treat entirely negatively the rights or the assertion of rights provided for in the Court's consent decree. It tells the parents nothing about what conceivably could be good about a decree fashioned after great struggle and much time in this court. It tells them only what might be bad, that this might be some kind of busing situation. And it pretends on that basis to implement and comply with the Court's decree.

The Court advises these intervenors that the form letter is not viewed by the Court as having that effect, but is viewed instead as having the purpose and effect of obstructing and diverting attention from the meaning and effects of the Court's decree.

As to the matter of supersession, which the intervenors advise us is pending in state administrative proceedings, that is not a question on which the federal court is required at this stage to make any pronouncements. The allocation of power as among state officials is, in the first instance, and we would hope in the ultimate instance, a matter for resolution by the appropriate state authorities rather than the federal court.

The concern of this Court throughout is with the just and effective enforcement of its consent decree. Whatever happens in the state proceedings, whether this board

is or remains superseded or not, will not be a concern of this District Court until or unless somebody claims that the effect of those state arrangements and the distribution of powers and authorities under those arrangements have been in some way to obstruct the operation of the Court's decree or impair its effectiveness. At that time, and only at that time, would this Court have reason to concern itself with whether or to what extent this local board should be superseded.

I will add by way of somewhat obiter dictum -- and I realize the obiter dicta of District Judges are not the most august pronouncements in the world, but for whatever guidance it may supply -- I will add that these petitioners are faced, apparently for the first time, with a sense of the responsibility they might be assuming by seeking to intervene and have chosen to take a somewhat gingerly view of that status to which they assertedly have been aspiring.

On the other hand, the Chancellor and the board, the others who are defendants here, have for four long years taken the burden of the responsibilities of defendants in this case and have undertaken, in my judgment, to discharge those burdens with care, with thought, and with sensitivity.

Obviously, I make no judgment, because I have no basis for making a judgment, about how strong a case there

is against them in the pending contempt proceeding. But however that comes out, it has been made perfectly clear to me that these people have been quite willing to take the heat as well as exercise the authority. They are the people before this Court. If there are questions of compliance with this Court's decree, the judges of this court cannot be made to run around the city and dicker with every community board and its members about what they might prefer or not prefer in the way of forms of compliance with the Court's decree. Prima facie, the people this Court must deal with are the parties to the litigation in this court, the people who have both the power and the responsibility for dealing with the Court. And I think it would be well for these local boards to bear that in mind when they figure out that they have some better or more clever or more suitable way of complying with the Court's decree, and in that fashion propose to exercise power without being cheerfully willing, so far as I can see, to take responsibility.

It would help at least the District Court if all the various local people, whatever their excellent motives might be, would have that in mind; would have in mind that we have a big, cumbersome lawsuit here and that it is not for every local official or subordinate agency to decide for itself what is adequate compliance with the Court's decree.

Prima facie, I must and I will look to the named parties in this case for compliance with our decree.

On the basis of the things I have said, both for its procedural deficiency and for the substantive reasons I have suggested as alternative and additional grounds, the petition of this local board and its members will be dismissed. I will endorse it to that effect.

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